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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL RUCKER,

Defendant and Defendant.

B203503

(Los Angeles County
Super. Ct. No. NA070942)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John David Lord, Judge. Reversed and remanded.

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Junior, Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Darrell Rucker appeals his convictions of murder and personal use of a firearm. Before this court, defendant argues his convictions cannot stand because the trial court committed a number of errors: (1) in “adjudicating” his pre-trial request for counsel and in denying his request for counsel on the first day of trial; (2) in excluding certain lay testimony concerning Youngblood’s gang affiliation; (3) in engaging in misconduct during the trial when the court made comments to the jury and allowed extended argument in front of the jury concerning the manner in which defendant had conducted his defense pre-trial; (4) in allowing the prosecutor to use improper evidence to impeach defendant during his cross-examination, and in directing defendant to produce a document to the prosecutor; (5) in improperly using defendant’s juvenile prior as a “strike;” and (6) in failing to exercise its discretion in ordering the restitution fine it imposed. Defendant also argues the prosecutor engaged in misconduct, which violated defendant’s rights to compulsory process when the prosecutor failed to assist defendant in subpoenaing a defense witness. As we discuss, the extended colloquy in the jury’s presence, coupled with the court’s comments on defendant’s actions and tactics, prevented a fair trial. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In July of 2006, defendant lived in a one-bedroom apartment in Long Beach; defendant and his wife Lisa Shelbua were separated. She lived with their son Darrell Rucker, Jr. (“Junior”) in Bellflower. The victim, Malcolm Youngblood was defendant’s nephew—the son of Shelbua’s sister, Sandra Perry. At the time, Youngblood was 19 years old and Junior was a year younger. Youngblood and Junior were very close and Junior considered Youngblood “like a brother.”

Two months before Youngblood turned 18, he moved out of his parents’ home and began living with Shelbua. Youngblood lived with Shelbua for 11 months, but moved out after Shelbua had “problems” with him.

In January 2006, defendant agreed to allow Youngblood to stay with him. According to defendant, Youngblood was a gang member, who called himself “5150,” which meant “crazy” and he hung out with people who carried guns. Defendant suspected that Youngblood had a gun, but never saw Youngblood with one. In March 2006, defendant stated that a “shoot-out” occurred in front of his house.

Defendant told Youngblood that he could stay with him only until June 26, 2006. On June 26, Youngblood bought a 1995 Ford Taurus from defendant for \$1,000 and moved out. Defendant believed that Youngblood would not return.

Two weeks later, on Friday July 7, 2006, the Taurus broke down and Youngblood called defendant. Defendant told Youngblood that he could get the car fixed. When defendant returned home, Youngblood and a few other people were at his apartment. According to defendant, Youngblood told him “if you don’t fix the car, I’m going to ‘smoke’ you.” Defendant understood the term “smoke” to mean kill. Defendant contacted a friend, James Jones, who was a mechanic. Jones told defendant he would help him try to fix the car. Jones and defendant tried to fix the car. According to defendant, Youngblood said that if the car was not fixed he would “smoke” them both.

On July 9, 2006, defendant returned home to find Youngblood and Junior at his house and a number of others hanging around outside. Defendant allowed Youngblood to borrow defendant’s car, but charged him \$100 to use it. Youngblood and Junior returned to defendant’s apartment later that evening.

Defendant awoke at about 5:00 a.m. the next morning and smoked a marijuana cigarette.¹

Defendant went into the front room and spoke to Junior about the other people who had been hanging around. Asking whether Junior was having problems with them and needed help, Junior said “No.” Nonetheless, defendant led his son into defendant’s bedroom and took out a .357 revolver handgun out of the dresser. Defendant unloaded

¹ Defendant apparently had a prescription to use marijuana.

the gun and gave it to Junior, who held it and then gave it back to defendant. They returned to the front room of the house where Youngblood was located.

Youngblood and defendant got into a heated argument about the Taurus. They argued for over an hour. According to the statement Junior gave to the police later that day, when Youngblood confronted defendant about paying to rent the car, defendant “laughed it off.” Youngblood told defendant that if the mechanic did not fix the Taurus he was going to “fuck him up.” Defendant then left and went into his bedroom for a while. Junior told the police defendant returned to the front room several minutes later carrying the .357 handgun defendant had shown Junior earlier. Junior stated that defendant stood about 10 feet away from Youngblood who was seated on the blow-up mattress. Without warning defendant shot Youngblood in the upper chest as he yelled “You demon.” Youngblood slouched over and stated “I’m sorry. I’m sorry.” Junior screamed for defendant to stop shooting, but defendant approached Youngblood within three feet and shot him three to four more times in the chest and back, continuing to yell “You demon.” Junior screamed and defendant put a towel over his son’s mouth and told him that he could not leave until he calmed down. According to Junior, defendant said that Youngblood “is carrying the spirit of 50. I had to get rid of him. I am tired of him threatening me.” Junior believed that “50” was an “old school gangster.”

According to defendant during the argument immediately before the shooting, Youngblood made a number of references to his gang, and about having his gang behind him and about not “messing” with Youngblood. According to defendant, he was trying to keep the peace and offered to return Youngblood’s money, but Youngblood again threatened to kill defendant and the mechanic. Defendant stated that he believed that Youngblood was going to kill him. Defendant testified that he thought Youngblood was going for a gun. Defendant testified that he “blanked” and ran to his room to grab his gun. He ran back and saw a “blur,” which he thought was Youngblood, standing,

pointing at him. Defendant told the jury that he assumed or thought Youngblood held a gun. Defendant thought “someone was shooting me,” and defendant fired once.²

After the shooting, defendant determined that Youngblood was dead, paced the room, and then put his gun under the couch. At some point some of Youngblood’s friends came to the door asking for him. Defendant told them that Youngblood was not there. Defendant then tried to clean up the blood with a bucket of water and soap. He wrapped Youngblood’s body in sheets and garbage bags. He advised Junior not to tell anyone what had happened and that if asked, Junior should say that he was never there. Junior drove to his grandmother’s house. When he arrived, he told her what had occurred. She called the police.

When the police arrived at Junior’s grandmother’s home, Junior was crying and hysterical. He shouted “He shot him. He shot him. My dad shot [Youngblood.]” He told police the shooting had occurred about an hour before. Later that day Junior gave a complete statement to the police about what had occurred earlier at his father’s apartment. The detective who interviewed Junior stated that he was upset and reluctant to talk about the crime.³ He was unsure about whether he was doing the right thing by “telling” on his father. According to police, Junior denied that either he or Youngblood was a gang member.

² When defendant was interviewed by the police a few days later he did not tell them that he thought at the time that Youngblood was pointing a gun at him. Defendant told police that he believed that Youngblood was an active gang member, known as “5150.” He told police that Youngblood’s comments during the argument hit defendant “hard” and that he was not going to be killed by a “gang banger.” He told police that he “blanked” and shot Youngblood. Defendant told police he believed that Youngblood’s mind was made up to do something to him, and he decided he was not going to wait for him to “sneak up” on him to shoot defendant later.

³ About a year later when Junior testified during defendant’s trial, he indicated that he knew that defendant had shot Youngblood but could not remember any of the details of the event.

On July 13, 2006, defendant was arrested. Defendant was charged with first-degree murder, personal use of a firearm under Penal Code section 12022.53, and it was alleged that defendant had one prior strike conviction. In November 2006, defendant sought to relieve his retained counsel; the court granted his request to represent himself. The jury found defendant guilty of the charges and found the strike allegation true. The court sentenced defendant to a total of 75 years to life in prison.

This appeal followed.

DISCUSSION

Defendant asserts a number of reversible errors occurred prior to trial, during the presentation of the evidence and with respect to sentencing. For the reasons discussed below, we will reach only two of them: the claim of error in denying his request for counsel on the first day of trial; and his claim of misconduct by the court.

I. Defendant's Request for Counsel on May 16, 2007, and June 5, 2007.

A. Relevant Background.

Proceedings Prior to May 16, 2007. After defendant was arrested and charged he retained private counsel, but at a hearing on November 8, 2006, defendant sought to remove his retained counsel and sought to represent himself. Defendant told the court that he wanted to remove counsel because of a "lack of a defense and lack of preparation of the case." The court admonished defendant that it was "foolish" to represent himself on the charges and that he would probably be convicted. The court stated that it would appoint defendant a public defender if he so desired, but also advised defendant that if he represented himself he would not be permitted to come to court and ask for appointed counsel on the first day of trial. The court indicated that it would not continue the trial date, which was then scheduled for January 5, 2007. Defendant told the court he wanted to represent himself and he completed the necessary paper work to do so. The court appointed an investigator, Mr. Watson, to help defendant prepare his case and gave him \$1,000 for the investigation expenses.

In early 2007 the prosecutor provided defendant with discovery. Apparently, during this time, defendant did not use the services of Mr. Watson.

On April 20, 2007, defendant filed a Code of Civil Procedure section 170.6 motion to challenge the judge originally assigned to the case; the motion was based in part on the comments the judge had made to defendant concerning the lack of wisdom of self-representation. The matter was assigned to a new judge. At the first hearing before the new judge, the prosecutor represented that all discovery had been turned over to the defense. Defendant informed the court that he had not prepared for trial because he had not had the services of an investigator to assist him. When the court reminded defendant that an investigator had been appointed in November of 2006, defendant stated that he wanted to choose his own investigator and did not want one assigned by the court. Defendant told the court that he thought Mr. Watson was “compromised” and that he could not trust him because the judge originally assigned to the case had chosen the investigator. The court explained to defendant that investigators were assigned from an approved list based on their experience and availability and that Mr. Watson was known to be a good investigator. Defendant stated that he wanted an investigator “biased” in his favor. The court told defendant that it would not assign a new investigator unless defendant came up with a legitimate reason to replace him.

The court then inquired whether defendant wanted counsel. Defendant indicated that he did not, that he would begin using Mr. Watson, would start preparing his case, and would try to be ready to proceed with trial on June 5. The court told defendant that any motion to continue the trial would not be granted without a substantial reason.

At a subsequent hearing on April 30, 2007, defendant asked for appointment of a new investigator of his own choosing. The court denied the request and told defendant to ask Mr. Watson to assist him, and noted that the court would not be delaying the trial if defendant did nothing. The court again asked defendant if he wanted appointed counsel. Defendant requested “stand-by” counsel instead. The court denied his request.

At the next pre-trial hearing on May 14, 2007, defendant again asked for a new investigator. Defendant complained that he had been denied the opportunity to prepare

for his case because he did not have an investigator of his choice. The court denied the request. Defendant then inquired whether, if he had appointed counsel, he would stay housed in the pro-per jail unit.

The court and defendant discussed whether defendant wanted to have appointed counsel. The court stated that it did not want to delay the start date of the trial, so that any counsel would need to be ready by June 5; the court further observed that it was unlikely that any counsel would be ready by that date. Defendant again stated that he did not want appointed counsel. The court told defendant that if he was not going to be ready to defend himself by June 5, he would need to file a motion.

The discussion concerning counsel continued with the court emphasizing that appointment of counsel after that date would mean that the lawyer would not be ready for trial by the start date and that the court would not delay the trial without good cause. Defendant then told the court that he “was out of his league;” the court summoned a public defender. The public defender stated that it was unlikely that his office could be ready by June 5, that it needed to review the discovery before it could accept the appointment, and that he thought they might need two weeks to prepare. The court observed that it might have to continue the trial to get appointed counsel up to speed on the case, but also stated it would not grant a continuance if defendant served as his own counsel. The court continued the matter until May 16, to determine whether the public defender could accept the case and determine the time needed for the public defender to prepare for the case.

May 16, 2007. When the hearing reconvened on May 16, the public defender who appeared to represent defendant indicated her belief that defendant did not want her to represent him. She further stated that, in any event, her office could not be ready to proceed with trial on June 5. The court explained to defendant how the appointment of counsel worked—that the assignment went first to the public defender and that if they had a conflict it would be sent to the alternative public defender and then to a lawyer on the appointment panel list if the alternative public defender could not take the case. The court asked whether defendant wanted appointed counsel or a specific lawyer. Defendant

stated that he wanted to come back in a week to discuss the matter. The following exchange occurred:

THE COURT: Well not to answer that question, but do you want to continue to represent yourself? You, of course, can hire private counsel at any time, and as long as that attorney will be ready on the scheduled date, then that attorney can sub in. You can hire anyone you want. If you want appointed counsel, then it will be a different discussion.

THE DEFENDANT: Yeah, I hear you, Your Honor. But I don't think that any attorney that possibly would take the case would be ready for a June 5th trial date, any attorney that takes over.

THE COURT: That's probably correct. I think I've had this conversation with you every time you've come out, that if you wanted appointed counsel you need to let us know right away. I think I repeated many times that I am not going to change the trial date. It's only the last time that you indicated you wanted counsel. But as I understand it, you don't want the attorney that would be assigned from the public defender's office; is that correct?

THE DEFENDANT: Yes, that is correct, Your Honor. Actually, I had a private attorney before I became pro per, so maybe you can appoint a state appointed – something of that magnitude.

The court denied the request and again explained how assignments are made to the public defender's office. Defendant expressed a concern that neither he nor any counsel could be prepared to go to trial by June 5; he complained that he did not have time to prepare an adequate defense. The court responded with its belief that defendant was merely trying to delay the trial and stated that the trial would go forward unless defendant showed "significant good cause."

May 21, 2007. At defendant's request the court appointed defendant a new investigator.

June 5, 2007. The trial began on June 5, 2007. At the beginning of the proceedings defendant made an oral request for a continuance for 30 days so his new investigator could prepare for the trial. He told the court that he wanted to represent

himself but did not feel he had enough time to prepare his defense. The court denied the motion, observing that defendant had been appointed an investigator back in November 2006 and thus had made an insufficient showing for a continuance. The court then explained the jury selection process and asked defendant whether he understood how it worked. Defendant said no, and then refused to further respond to the court, stating that he did not understand any of the court's actions, that he felt he was at a disadvantage, and that the process was unfair. He also complained that none of his witnesses had been subpoenaed. He stated if they were going to proceed he was doing so under duress. The court stated that it would instruct the clerk to get in touch with defendant's new investigator to see if he could subpoena defendant's witnesses.

The court then brought in the potential jurors. After the jury was excused for the noon recess, defendant asked the court to appoint counsel. For the next 25 minutes, the parties discussed the history of the case with respect to the counsel issues. Defendant indicated that if appointment of counsel was the only way he could obtain more time to prepare his defense then he wanted counsel. He stated that he would even accept the public defender he had earlier rejected. The court observed that had defendant previously accepted the public defender as his counsel that would have necessitated a continuance, but an appointment of new counsel (requiring a continuance on the first day of trial) was unfair to the prosecution; that from the prosecutor's prospective it probably looked like defendant was "playing games with the system;" and that although defendant was denying such motives, his conduct was consistent with "gamesmanship." Defendant stated that what he really wanted was to have his investigator get the information and witnesses he needed so that defendant could prepare; he did not want to hand over the case to someone else unless that was the only way he could prepare a proper defense. The court stated it would consider the request for appointment of counsel over the lunch break. The court further indicated that defendant's investigator was on the telephone and that he would come to court to get the information about defendant's witnesses. The court also noted that "it is not terribly likely that I am going to allow a delay in this trial," but would consider it.

When the proceedings resumed in the afternoon, the court ruled:

THE COURT: All right. I do not believe that it is reasonable to believe that any competent attorney would be able to come in the case at this point, at a point where we're in voir dire on the jury, on a case with this type of charge, I don't believe a competent attorney would be able to come in and take a case and continue on with the trial, which means that the attorney would have to request a continuance in order to be appointed on the case.

In addition to that, the public defender's officer has specifically said that they would not be able to take the case unless there was a continuance.

So I'm denying your motion to continue, and denying your late motion – if it's actually a bona fide decision – to accept appointed counsel.

So we are going forward with the trial. I have been saying since the first day I saw you that, we were going forward with the trial and there wouldn't be any delays. And your request today, in the middle of voir dire, is untimely.

B. Defendant's Claims.

1. Defendant's May 2007 Pre-Trial Request for Appointment of Counsel.

The rights of a criminal defendant to counsel and to present a defense are among the most “sacred and sensitive of our constitutional rights.” (*People v. Ortiz* (1990) 51 Cal.3d 975, 982.) In general, a defendant is entitled to the counsel of his or her choosing, though there is no absolute right to be represented by a particular lawyer. The courts will make all reasonable efforts to insure that a defendant financially able to retain an attorney of his own choice can be represented by that attorney. Under certain circumstances, due process is denied to a defendant who is not granted a continuance in order to secure a private attorney of his own choosing. (*People v. Reaves* (1974) 42 Cal.App.3d 852, 855-856.) The Supreme Court has held “that a criminal defendant cannot be deprived of the opportunity to retain counsel of his choice except when bestowal of that benefit would prejudice him or unreasonably disrupt the orderly administration of justice. [Citation.]” (*People v. Haskett* (1982) 30 Cal.3d 841, 852.) “[A] myopic insistence upon

expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.]” (*People v. Crovedi* (1966) 65 Cal.2d 199, 207.)

However, once waived the right to counsel is no longer absolute and consideration of a defendant’s post-waiver request for counsel is within the discretion of the court. (*United States v. Leveto* (3d Cir. 2008) 540 F.3d 200, 207.) Although the courts have an interest in safeguarding a defendant's access to professional legal representation, other factors necessarily play an important role in the court's deliberation of a post-waiver request for counsel, including evidence of a defendant's dilatory motive as well as the practical concerns of managing its docket and the impact that a request may have on the administration of justice. (*Ibid.*; see also *United States v. Criden* (3d Cir. 1981) 648 F.2d 814, 818 [“A criminal defendant has a constitutional right to defend himself; and with rights come responsibilities. If at the last minute he gets cold feet and wants a lawyer to defend him he runs the risk that the judge will hold him to his original decision in order to avoid the disruption of the court's schedule that a continuance granted on the very day that trial is scheduled to begin is bound to cause”].)

In addition, the granting of a continuance is within the discretion of the trial court; “it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.” (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; *People v. Crovedi, supra*, 65 Cal.2d at pp. 206-207.) A continuance may be denied if the accused is “unjustifiably dilatory” in obtaining counsel, or “if he arbitrarily chooses to substitute counsel at the time of trial.” (*People v. Byoune* (1966) 65 Cal.2d 345, 346-347.)

Defendant makes two arguments with respect to his May 14, 2007, request for appointment of counsel. First, he asserts that the court erred during the May 16, 2007, hearing when it suggested that it would grant defendant a continuance if he accepted appointed counsel, but would not delay the trial otherwise. Defendant further argues the court erred when it stated that it would not grant a continuance for counsel to prepare, no matter what, that the court would only allow defendant to have counsel if his lawyer was

ready to begin trial on June 5. Defendant asserts that it was improper to condition defendant's right to counsel on the requirement that he agree to accept counsel that could proceed on June 5 even if that counsel was unprepared to defend him. Defendant maintains that the court's rulings at the May 16, 2007, hearing effectively denied his right to counsel.

We disagree. Preliminarily, defendant's arguments mischaracterize the record. The court did not rule that it would never grant defendant a continuance for new counsel to prepare for trial. Instead at the outset of the May 14 hearing, prior to defendant's request for counsel, the court stated that it did not want to delay the trial and observed that it was unlikely that any counsel would be ready by June 5. The court emphasized that appointment of counsel after the May 14 hearing would mean that the lawyer would not be ready for trial by the scheduled start date and that the court would not delay the trial without good cause. Later in that hearing, after defendant requested appointment of counsel and after the public defender arrived to discuss the potential appointment, the court observed that it might have to continue the trial to get appointed counsel up to speed on the case. By the end of the May 14 proceeding, the court's comments indicated a willingness to grant a continuance. The court's position on a continuance was later underscored on June 5 when the parties revisited the issue and the court stated that had defendant accepted the appointment of counsel in May, a continuance would have been warranted.

Second, also lacking support in the record is defendant's characterization of the court's comments that it would grant a continuance for appointed counsel, but not for retained counsel. The court's statements about private counsel were made during the May 16 hearing in the context of the court's explanation that defendant could not choose a particular public defender, that absent good cause he had to accept the defender assigned to him, while in contrast he could hire any private lawyer of his choosing. The court's remarks concerning private retained counsel do not suggest a view that the court would not have granted private counsel a continuance had defendant timely made the request for private counsel.

In view of the record of the proceedings on May 14 and May 16 and in light of the circumstances of prior proceedings, we conclude that the trial court did not deny defendant due process in adjudicating the pre-trial request for counsel. It appears that the trial court, although reluctant to do so, would have entertained a motion to continue the trial if defendant had accepted the appointment of counsel or had retained his own counsel by May 16. However, it is also clear that by the conclusion of the May 16 proceeding, after defendant rejected the public defender without clear or sound reason in favor of some other unnamed “state” lawyer, the court did not believe that defendant’s request for counsel was genuine but was instead an attempt to delay the proceedings. The court’s action and comments do not demonstrate a violation of defendant’s constitutional right to counsel or an unreasonable inflexibility with respect to granting a continuance. Indeed, even after defendant rejected the appointment of the public defender on May 16, the court indicated that it could grant a continuance on a showing of “significant good cause.” In view of the foregoing, we conclude the court did not abuse its discretion with respect to the pre-trial request for appointment of counsel.

2. Defendant’s June 5, 2007, Request for Appointment of Counsel.

“When a criminal defendant who has waived his right to counsel and elected to represent himself . . . seeks, during trial, to revoke that waiver and have counsel appointed, the trial court must exercise its discretion under the totality of the circumstances, considering factors including the defendant’s reasons for seeking to revoke the waiver, and the delay or disruption revocation is likely to cause the court, the jury, and other parties.” (*People v. Lawrence* (2009) 46 Cal.4th 186, 188.) The *Lawrence* court referred to factors set out in *People v. Elliott* (1977) 70 Cal.App.3d 984. In *Elliott*, the court set forth a nonexclusive list of factors for a court to consider in connection with a mid-trial request of a defendant to revoke his pro. per. status: (1) defendant’s prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the

likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*Elliott*, at pp. 993-994.) The *Lawrence* court also referred to *People v. Gallego* (1990) 52 Cal.3d 115, 163-164, in which the Supreme Court had examined the *Elliott* factors and concluded that the trial court's discretion was to be based on the totality of the circumstances, not strictly on the listed factors: "While the consideration of these criteria [listed in *Elliott*] is obviously relevant and helpful to a trial court in resolving the issue, they are not absolutes, and in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial.'" (*Gallego*, at p. 164.) The *Lawrence* court rejected the arguments that the trial court was required to review on the record each factor mentioned in *Elliott* or that any one factor was necessarily determinative: "The standard is whether the court's decision was an abuse of its discretion under the totality of the circumstances . . . not whether the court correctly listed factors or whether any one factor should have been weighed more heavily in the balance." (*People v. Lawrence*, *supra*, 46 Cal.4th at p. 196.)

Defendant argues that the court erred in denying defendant's request for counsel on June 5. He claims there is no evidence in the record to show that the court considered any of the *Elliott* factors in denying his request for counsel.

The trial court did not abuse its discretion in resolving this issue. Even though the trial court did not specifically mention any of the *Elliott* factors by name or use any particular words like "bad faith" in making its ruling, the court considered the totality of circumstances addressed in *Elliott* before reaching its decision. During the lengthy discussion of the issue, the court referred to the history of defendant's request for counsel, and defendant's failure to prepare for trial or use his investigator to prepare. The court referred to the burden on the prosecution to be ready to go forward. The court mentioned defendant's "gamesmanship" during the proceedings. These matters were relevant under *Lawrence* and *Elliott* and are supported by the record. In the abstract, his motivation for requesting counsel may not be patently unreasonable. In view of the

history of this case, however, defendant's rationale for seeking appointment of counsel suggests improper motive and delaying tactics.

Defendant had time, opportunity and resources to prepare for his defense well prior to June 5, 2007. Defendant initially discharged his retained counsel in November 2006 on a claim that counsel had not been preparing defendant's case. The court appointed an investigator and ordered funds for defendant to prepare his defense at that time. This notwithstanding, it appears based on the record before this court that defendant did very little to prepare for trial over the next six months other than request discovery from the prosecutor. Even after defendant received all discovery from the district attorney's office, defendant did not use his investigator to work on the defense. Defendant's statements on the first day of trial concerning his need to locate witnesses reflect that defendant had still not prepared for trial or asked his new investigator to find his witnesses. Based on all of the circumstances of the case concerning the appointment of counsel, and in light of *Lawrence*, we conclude the court did not abuse its discretion in denying defendant's request for counsel during *voir dire* on the first day of trial.

II. Claimed Judicial Misconduct

Defendant asserts that the court's comments in the presence of the jury, on both June 11 and June 13, 2007, were misconduct which deprived him of the right to a fair trial. Although we are sympathetic to the difficulties defendant caused the court in managing this trial, we agree that the extensive proceedings and comments crossed the line and became so prejudicial as to prevent a meaningful defense.

While a trial court must control the proceedings in front of it (Pen. Code, § 1044), it "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353, superseded by statute on other grounds.) We must determine whether the conduct was so prejudicial as to deny the defendant a fair trial. (*People v. Harris* (2005) 37 Cal.4th 310, 347.)

"Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. [Citation.] When 'the trial court

persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary. [Citation.]”
(*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.)

Here, defendant was both his own counsel and his own witness. The extended colloquy in the presence of the jury was both disparaging and discrediting, and placed information before the jury that the court, in almost the same breath, was required to tell the jury to disregard. The effect was to deprive the defendant of the opportunity for the jury to draw their own conclusions as to the matters before them unaffected by the clear conclusions of the court.

Proceedings on June 11 - Morning

From the beginning of the trial, the court had warned defendant that there would be consequences if he disrupted the proceedings or attempted to mislead the jury; the court was clear that those consequences could be “devastating” and “very, very damaging.” On June 11, when defendant persisted in trying to call a witness, a request the court had already denied outside of the presence of the jury, the court engaged in a discussion with defendant and the prosecutor in the jury's presence which encompassed more than 20 pages of the trial transcript. The court elicited an offer of proof from defendant, and advised him that the proposed testimony was inappropriate. Defendant asked the court not to display a dispute between them to the jury, and the prosecutor argued why he believed the testimony should not be permitted and why defendant's actions were inappropriate and causing unwarranted delay of the trial. Finally, and still in the presence of the jury, the following exchange took place:

THE COURT: Mr. Rucker, I told you that you would be held to the same standard and have to follow the same rules as an attorney. I explained that to you, and I have done my best to try to get you to accept appointed counsel from the very first day that I saw you, and you have declined,

choosing instead to represent yourself, knowing at all times that you would be held to the same standards as any other attorney.

THE DEFENDANT: Actually, Your Honor –

THE COURT: And any attorney would know that if they're going to call a witness and they're asked for an offer of proof, they would have to tell me, give me some indication of what new evidence or relevant evidence that witness was going to present. And if they don't have a witness here and under subpoena, they know that they can't simply keep repeating the name of a witness that they do not have here and do not have under subpoena.

THE DEFENDANT: Actually, Your Honor –

THE COURT: You've chosen to represent yourself. The law says you have that absolute right and there is nothing that the court can do about that, if you choose to represent yourself. Despite all of the advice that I have given you from day one, that you should accept appointed counsel, you've chose to represent yourself, as your own attorney.

Call a witness who is here to testify.

(Pause)

THE DEFENDANT: I ask forgiveness to you 12 people over there, ladies and gentlemen.

[THE PROSECUTOR]: Your Honor, please. I would ask to cut off any more dissertations to the jury or otherwise and have him ordered to respond to the court's direction.

THE DEFENDANT: Actually, Your Honor, dealing with this situation and dealing with you is really a tense situation, where you're establishing all of the roadblocks instead of giving assistance to the defense. Because all of my expense comes through you. Whether I have an investigator, it comes through you. Whether I have a psychologist here, it comes through you. Whether I have these witnesses here, it comes through you.

So what I'm saying is if you're denying me the things that I need to put on an adequate defense, how can I put on a defense if you're prohibiting, you're telling me you're a referee, but at the same time –

THE COURT: Well, Mr. Rucker, I'm simply not going to let you mislead the jury in that regard.

You've had an investigator on this case from early on, when you were even in another court, and you told me that you didn't like that investigator. You gave me no reason, whatsoever, you just didn't want to use that investigator, so I gave you a new investigator.

And after I gave you the new investigator, then you said you didn't want that investigator, for no reason. You wanted that investigator, but you wanted him appointed for some other reason other than to be your investigator.

I have appointed virtually every expert that you have asked for. I have done everything that I could. I've granted virtually every request that you have made to this court. And I've already told you that I have a great suspicion about why you're engaging in the conduct and in the pattern that you're engaging in.

It is not an appropriate issue for this jury, and I'm going to explain to them, ladies and gentlemen, your duty is to decide the facts in this case. Now, there are other proceedings, some proceedings that run parallel, some proceedings that run subsequent or in a different lineal path, all right, but at this point the only issue that is relevant to this jury is just the facts of this case, the criminal charge in this case, and whether the elements have been proven beyond a reasonable doubt.

And I want to caution you not to let this exchange have an effect on your decision in this case. And, certainly, you cannot think about other issues that are not relevant to this case. If there is something relevant for your decision, I will give you that instruction as to what is relevant for you to decide, and that is narrowly the decision for this jury.

All right. It's time for you to call a witness, Mr. Rucker.

THE DEFENDANT: Look, Your Honor, I'm not trying to be a problem to the court, I'm trying to put on a defense here. Foundation has to be laid all the way up from the beginning, the evening, and ending to the beginning of this case.

THE COURT: Well, I'm not going to waste any more time with this. I've already told you that I wanted to get your one witness on the way to other duties.

The court, defendant and prosecutor then returned to a lengthy discussion of why defendant wished to call his witness, ending only when the court dismissed the jury for the noon recess. The discussion continued outside of their presence. During that discussion, the court made clear that if defendant did not himself testify after the recess, the court would proceed directly to argument and instructions.

Proceedings on June 11-afternoon

After the noon recess, the court again engaged defendant in extensive discussions outside the presence of the jury. When the jury returned, defendant indicated that he had no witness present, and that he did not wish to testify until his witnesses had testified. The court again indicated that defendant's actions were inappropriate, and in the jury's hearing discussed at length its views of the relevancy of defendant's witnesses. The court again permitted the prosecutor to make disparaging comments concerning defendant's statements. The prosecutor then made his closing argument, after which defendant testified.

During the lengthy colloquy, the court again displayed its recognition that these matters were not properly before the jury, and instructed the jury as follows:

THE COURT: Now, ladies and gentlemen, I'm going to be giving you instructions about the issues that are before this jury. All right. And you're going to have to follow those instructions. My concern is that some jurors may have a concern in an area that is not really an appropriate issue for the jury to consider, one of which might be that the court is excluding a witness that could be favorable to the defense.

All right. I've had a long discussion, several discussions with Mr. Rucker, and there may be relevance to certain witnesses, depending on what evidence is offered, and Mr. Rucker has a right to offer that evidence.

He has stated in his – in kind of argument, you know, his statements from counsel table, he has used the term relating to self defense.

So Mr. Rucker has a right to testify and cover that issue. He has a right not to testify, if he doesn't want to. But you cannot allow any consideration of any exchange that we're having, you can't allow an indication that there is another witness out there – if a witness doesn't testify, then it's not in the evidence, it's just as simple as that, and you have to decide the case based solely on the evidence.

There are many rules and protections in the law, and I'm doing my best to follow the law. I have to be fair to both sides. There are two sides to a case, a criminal case or civil case, there are two sides to it, and both sides have a right to a fair trial.

This was followed by the following exchange:

[THE COURT:] All right. Do you want to testify, Mr. Rucker?

THE DEFENDANT: I would like to testify after my witnesses come in and lay a foundation for the circumstances of this case to the point where the incident happened. And if I don't have those witnesses come in, it would jeopardize the defense, for the people to get a clear picture of what happened and what went on. And the only way I can do that is through the establishment of witnesses.

THE COURT: Neither side could call a witness to support a claim on a justifiable use of force, unless there is first evidence presented to the jury that there was a justifiable use of force from either side. The defense side, that's normally what we're talking about when we use the term self defense.

So there would first have to be evidence of self defense, before any other witnesses, their testimony would be relevant, if there are other witnesses that could support that claim.

I have explained that to you, Mr. Rucker, so if you want these other witnesses that you indicated exist, then it's up to you to present the preliminary evidence, that is, it's up to you to testify, if you want to.

THE DEFENDANT: I will testify, Your Honor, after the foundation is laid for my testimony.

THE COURT: Well, you told me on Friday you were the first witness, that you were going to be the first witness, and I've been waiting

patiently and trying to explain this in every fashion that I can. I don't want this jury to decide the case based on issues that are not before them.

There are not witnesses that I am withholding from you. In fact, there are witnesses that we have, we have gotten for you, or the People, because the court doesn't get the witnesses directly, prepared, so that you can call those witnesses, if there is evidence before this jury that makes any of their testimony relevant.

So it's up [to] you. This is the time. If you're going to testify, this is the time, or we're going to go to argument and instructions. I've repeated this – this is probably, well, I can't even begin to count. If you want to testify, take the stand and testify. None of the other witnesses that you've talked about have any relevance unless you testify and tell the jury your version of the events.

Proceedings on June 13

During defendant's testimony on June 13, a dispute arose concerning a document to which he had referred but did not wish to provide to the prosecutor. Defendant referred to the fact that he was not a lawyer, and this exchange followed:

[THE DEFENDANT:] I ask you guys for forgiveness. I'm not a lawyer. I'm just holding my ground.

THE COURT: The jury has to make the decision in this case solely on the evidence that's presented. I have done my best to try to get Mr. Rucker to accept court-appointed counsel. He has a right to court-appointed counsel. At no cost to him, and despite all that, he has chosen to represent himself. And that fact that he's representing himself has absolutely no bearing on the decision that this jury does make.

[THE PROSECUTOR:] Your Honor, with the court's permission –

THE DEFENDANT: Actually, the truth is –

THE COURT: That is the truth, Mr. Rucker. Every time I saw you, I tried to get you to accept court-appointed counsel and you declined.

THE DEFENDANT: Actually, Your Honor, the truth before –

THE COURT: That is the truth.

THE DEFENDANT: -- before the jurors came --

THE COURT: All right. Ladies and gentlemen, could you step out, please.

THE DEFENDANT: I asked for a lawyer.

Before they came in, I asked for a lawyer.

Later that day, during the testimony of another witness, the following took place in the juror's presence:

THE DEFENDANT: Your Honor, you restricted all testimony.

THE COURT: No, I didn't.

THE DEFENDANT: Yes, you actually did.

THE COURT: Do you have any other witnesses?

THE DEFENDANT: Yes. Lisa Shelbua.

THE COURT: Well, we've finished that witness.

Any other witnesses?

THE DEFENDANT: I'm not finished with her. It's things I need her to say.

THE COURT: Out of the presence of the jury, I asked you to establish some relevant testimony that that witness would offer, and you were unable to do that, or unwilling to do that, and so that witness is done.

Do you have another witness?

THE DEFENDANT: Actually, the things that I want her to verify --

[THE PROSECUTOR]: Your Honor, at this point we've had a discussion out of the presence of the jury for a specific reason, to not go into ridiculous, irrelevant information. I'd ask not to have a dissertation of what -- the very reason this jury spent all this time away from us.

THE COURT: Do you have another witness, other than Ms. Shelbua?

THE DEFENDANT: Actually, I need her right now to verify some things.

THE COURT: She's done.

Defendant presented his closing argument later that day. He referred at the outset to his request for a lawyer; the court then stated:

THE COURT: As I explained to Mr. Rucker –

THE DEFENDANT: -- as I explained to the jury –

THE COURT: -- if he attempted to mislead – Mr. Rucker –

THE BAILIFF: One at a time.

THE COURT: Mr. Rucker. Mr. Rucker.

THE DEFENDANT: They ushered you guys out.

THE COURT: Have him have a seat.

THE DEFENDANT: Such as now. Every time I say something, the truth –

THE COURT: Have him have a seat.

THE DEFENDANT: -- they restrain me like this. I'm unable to get you guys my defense and tell you the truth.

THE COURT: Okay.

THE DEFENDANT: They have the manpower. They have the gun. They have the prosecution.

THE COURT: Mr. Rucker –

THE DEFENDANT: You guys are the People. I am the People. He's a prosecutor. He's the judge. These gentlemen work for the court. I

cannot have a voice, unless I am free to tell my truth. And I'm willing to give you guys that all along the way, to tell you guys whatever it is about the truth. And every[]time I state the truth, I'm made to shut up or he ushers you guys out of here really quick and restrains me, and that is putting me in a position to not to be able to tell the truth about the matters in my case.

Now, I'm willing to say that I'm in this fire, but, for the record, I need it to reflect the truth, things that are taking place in this case that are not legal, based on the law, number one.

But before you guys entered that box, I asked for a lawyer. It was refused me. He said, 'I'm not going to give you a lawyer, because a lawyer is going to have to take the time to go through your case, and I don't want a lawyer to take the time to go through your case, because I want to prosecute you now.'

So I'm hereby forced, forced, not by choice, but trying to do the best that I can to make sure I can bring the light to this situation, with my lack of experience as being a lawyer.

May I proceed with my rebuttal, or do you want to usher them out again and tell me not to say such things? It's on you.

THE COURT: As I explained to you, Mr. Rucker, if you sought to mislead the jury, I would have to correct and disabuse them.

THE DEFENDANT: I'm not misleading the jury, Your Honor. It's only right that I use my voice.

THE COURT: The first time Mr. Rucker was here –

THE DEFENDANT: If I don't, I will be a fool. If I don't speak up and tell them the truth, it would be foolish.

THE COURT: If I have to, I'll have you out of the courtroom.

The first time that I saw Mr. Rucker – he has a constitutional right to represent himself. I urged him to accept court-appointed counsel. On every subsequent meeting that I had with Mr. Rucker here in court, I told him he should accept court-appointed counsel.

I told him that the trial date was set for June 5th, and that we were not going to continue the case absent good cause to continue the case. I told him that a lawyer could not come in on the day of trial, because no competent attorney can accept a case on the day of trial and then somehow prepare, instantaneously, certainly on a charge this serious.

I went through this with Mr. Rucker repeatedly, and with very long explanations. I sought to appoint an attorney for Mr. Rucker again in May, even though that would have required a continuance, but he rejected the attorney that I sought to appoint, and rejected the entire second offer [sic] that would have been appointed, if he wasn't appointed an attorney from the first office. And I again warned Mr. Rucker that on the day of trial we are not going to continue the case. Because the People have an obligation to be ready for trial, and if they're not ready for trial on the day of trial, they face dismissal of the case. So the People have an obligation to be prepared for trial on the day of trial.

And I have gone through this with Mr. Rucker, and I told him that on the day of trial I would not appoint an attorney that would then require, after the People are ready and announce ready, to appoint an attorney and then have the case delayed.

Before we brought the jury down, Mr. Rucker had several motions. We went through those motions, and I asked him if he had any other motions, and he said no, and that's when we called the jury down to begin the voir dire process.

At that time, then Mr. Rucker said he wanted an attorney. All right. The court cannot allow people to do gamesmanship with the court. Both sides have a right to a speedy resolution of this case. The defendant, of course, has a right to a speedy and fair trial.

So the fact that Mr. Rucker said, after we brought you down for voir dire, at that point that he wants an attorney, that's true, that's what he said. I cannot appoint an attorney for someone under those circumstances, the system simply will not work. And Mr. Rucker was aware of that, I made him aware of it, as clear as I possibly could at every meeting, every hearing, every appearance that Mr. Rucker has had before me.

All right. And his case started with a different judge, and he was dissatisfied with that judge, and that's how it came to my court. I've done everything that I can to make sure that Mr. Rucker has a fair trial in

this case, but I cannot – it would be inappropriate for me to first require that the People are ready for trial or face a dismissal, and then if they are ready for trial and now we get past that, and then to allow the defense sort of one free bit, where first I'm going to see if the People are ready, and if they're not I get my case dismissed, and if they are, then I can force a continuance by asking for an attorney at that late moment.

I explained this to Mr. Rucker many times. I also explained to him that if he brought this up in front of you guys, that I would then have to explain a more full explanation of what the history of this case is.

All right. Now, in saying that, again, I want to stress, this is not an issue for this jury. No decision that you make in this case should be based, in any fashion, on the fact that Mr. Rucker either chose to represent himself, or that he asked for an attorney, or what his motivation was for asking for an attorney at the last minute, after we called you for voir dire. None of those issues have any bearing on whether the People have proved all of the elements beyond a reasonable doubt.

So you must separate your mind from that. But I don't want you to think that anyone is being unfair to Mr. Rucker, and for you to make any decision based on a conclusion that anyone is being unfair to Mr. Rucker.

I have expended a great deal of time and energy in trying my best to be as fair as I possibly can to Mr. Rucker, but the law is that Mr. Rucker has an absolute right to represent himself, period, and I cannot change that; I simply can't.

The Totality of the Court's Actions Deprived Defendant of a Fair Trial

The trial court was confronted with a difficult situation: a defendant, representing himself at trial, who failed to comply with court procedures and rulings. Nonetheless, the court had the duty to control the courtroom and the conduct of the proceedings. As the United States Supreme Court stated nearly 40 years ago in *Illinois v. Allen* (1970) 397 U.S. 337, 343-344, “[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive,

contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. *No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.* We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like *Allen*: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.” (Emphasis added.)

While these alternatives are not exclusive, the choice made by the trial court here was to conduct proceedings that should have gone forward outside the presence of the jury in their presence and, in the process, to expose those jurors to information and argument they should not have heard. These exchanges between the defendant, the court, and the prosecutor resulted in many statements by the court that would have led a reasonable juror to believe that the court believed the defendant was not only inappropriate but a liar attempting to manipulate the proceedings. Some of the language quoted earlier leaves no doubt as to the court’s views. These “persistent[] discourteous and disparaging remarks . . . discredit[ed] the defense” and improperly aligned the court with the prosecution. (*People v. Carpenter, supra*, 15 Cal. at p. 353.) A new trial is required.⁴

⁴ As a result of this determination, we need not address the remaining issues raised by defendant.

DISPOSITION

The judgment is reversed and this matter is remanded to the superior court to conduct a new trial.

ZELON J.

I concur:

JACKSON, J.

WOODS, J., Dissenting:

The determination that the trial court did not abuse its discretion in denying appellant's pre-trial request for counsel or his request for appointment of counsel during voir dire on the first day of trial is correct, and I concur in the analysis and conclusion in the opinion on those issues.

Nonetheless, I do not agree with the majority's conclusion that the trial court's comments before the jury denied the appellant a fair trial. As I shall explain, in my view, although the trial court engaged in overly lengthy discussions with the prosecutor and the appellant in front of the jury, and although the court made a few comments that in hindsight might have been better left unsaid or said outside the presence of the jury, the judge's behavior was not so prejudicial that it denied the appellant a fair trial.

The trial court has both the duty and the discretion to control the conduct of the trial. (*People v. Snow* (2003) 30 Cal.4th 43, 78; Evid. Code, § 1044.) It is within a trial court's discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior. (*Ibid.*) Furthermore, mere expressions of opinion by a trial judge based on actual observations concerning the conduct of the case, witnesses and evidence do not demonstrate bias or judicial misconduct. (*People v. Guerra* (2007) 37 Cal.4th 1067, 1111, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) However, the court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353, superseded by statute on other grounds.)

The appellate court's role in the assessment of claims of judicial misconduct is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied the defendant a fair trial. (*People v. Harris* (2005) 37 Cal.4th 310, 347, citing *United States v. Pisani* (2d Cir.

1985) 773 F.2d 397, 402.) As the United States Supreme Court stated nearly 40 years ago in *Illinois v. Allen* (1970) 397 U.S. 337, 343-344, “[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. *No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.* We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like *Allen*: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.” (Italics added.)¹

Before this court, appellant asserts the trial court committed misconduct during the trial on June 11, 2007, during both the morning session of the trial and in the afternoon session, when it made comments to the jury and allowed extended argument in front of the jury concerning the manner in which appellant had conducted his defense pre-trial. He also claims that on June 13 the court engaged in similar misconduct when it commented on appellant’s trial and pre-trial conduct during closing arguments.

¹ For his part, appellant argues in this court that the trial court should have used one of the other methods suggested in *Allen* to control the courtroom, such as admonishing him outside the presence of the jury, removing appellant from the courtroom, binding and gagging him or holding him in contempt. But appellant has not presented convincing argument that the other means he suggested would have been more effective or less damaging. The court did admonish appellant a number of times not to make references to irrelevant matters or to mislead the jury. The court warned appellant that it would inform the jury of the history of the case if he made reference to his lack of counsel or case preparation. In addition, because appellant was acting in pro per, he could not have carried on with his defense if he was removed from the courtroom or restrained from speaking. These other options would likely have necessitated a continuance in the trial and thereby would have achieved the result appellant was attempting to obtain through his obstreperous conduct.

The comments about which appellant complains must be viewed in the full context of the history of the case and the trial proceedings that occurred prior to June 11. As the majority opinion recognizes, from appellant's earliest pre-trial court appearances through the first day of trial, appellant made a number of requests for investigators, special housing, and re-appointment of counsel. He also expressed various complaints about a lack of resources and time to prepare. Appellant's pre-trial conduct might at first glance appear to reflect only a misunderstanding of legal procedures and court processes, conduct typical of a self-represented litigant facing serious criminal charges. However, by the start of trial, the appellant's interactions with the court demonstrate a calculated effort to delay the proceedings, manipulate court processes and taint the jury pool. Indeed, on the first day of the trial, June 5, 2007, after the court denied appellant's request for appointment of counsel and a continuance of the trial, the court admonished appellant as follows:

I'm going to bring the jury in and continue with the voir dire. And I need to advise you of one thing, Mr. Rucker, and that is that it is not appropriate to inject, in front of the jury issues regarding your readiness for trial or wanting attorneys . . . or anything along those lines. You already did it once in a fashion, by stating loud enough for the jury to hear that you were not ready for trial or something along those lines. It is not appropriate for you to do that. [¶] And if you engage in that conduct irrespective of this advisement by the court, then in order to make sure that the People's side of the case is not prejudiced by information that could mislead the jury, I am very likely, almost certain to advise the jury of – if you say something about not being able to have an attorney – of how many times you've been advised that not only that you have a right to an attorney, but being urged by the court to accept an attorney. And any other thing that you put before the jury that's inappropriate, the court may have to advise the jury of the accurate chronological history of the case. [¶] And I need to tell you also that based on my experience – and I've been at this in one fashion or another for about 30 years – that it can be very devastating to the defense, that is, to you, if you say something in front of the jury and then the court explains to the jury what the history is. If the jury concludes that your statement to them, either just shouted out in court or whatever, if they conclude that you said something that's not true, then that could be very, very damaging to your side of the case.

On June 6 before voir dire was concluded and outside the presence of the jury appellant again complained of his lack of counsel. Appellant threatened to shut down “every set of jurors that come up here.” The court twice warned appellant that if he attempted to taint the jury the court would explain to them everything it had done to appoint appellant a lawyer, and that such an explanation would be damaging to his case. Appellant’s complaints about the court’s comments and conduct of the proceedings on June 11 and 13 must be considered in light of appellant’s stated intentions at the outset of trial and prior conduct.

First, as to appellant’s complaints concerning the length of the discussions in front of the jury on June 11 and 13, I would agree that perhaps they consumed too much time. But the court did endeavor a number of times to move the proceedings along. The court patiently tried to get appellant to call witnesses and appellant continually refused. In view of the appellant’s right to present a defense, the court did what it could to give appellant every opportunity to make offers of proof and present relevant, admissible evidence. I am not convinced, in view of the court’s discretion to regulate the presentation of the evidence, that the court denied appellant a fair trial in allowing appellant to reargue issues concerning the presentation of the evidence. Appellant’s failure to present other witnesses, notwithstanding the court’s effort to get him to do so, does not demonstrate the court denied him a fair trial. Rather it demonstrates that appellant was not a competent legal advocate.

In any event, the fact that the court was not stricter with appellant and engaged appellant in a lengthy discussion of these matters did not result in prejudice. Many of the long discussions between the court and the parties centered on matters of law, procedure and the order of the presentation of the evidence—mundane housekeeping and procedural issues—to which the jury would not ordinarily be privy. Nonetheless, the fact that they were aired in front of the jury does not establish judicial misconduct or a denial of a fair trial especially where, as here, the court did not make any disparaging or inaccurate comments about appellant, or his evidence or otherwise create the impression it was allying itself with the prosecution.

Second, in my view, appellant's right to fair trial was not denied based on the court's recitation to the jury of the history of appellant's requests for counsel or use of the investigators. The court's comments were accurate; they were a fair response to appellant's remarks which implied that he had not been given the resources, the time to prepare for trial or offered assistance of counsel. As in other instances during the trial when appellant spoke out to the jury about his lack of counsel, deprivation of rights or the perceived unfairness by the prosecution, appellant misstated the circumstances of the case. The People also had a right to a fair trial and thus, the court had a duty to correct the misinformation and did so with an accurate description of what had previously transpired.

Furthermore, outside the presence of the jury, the court repeatedly warned appellant that it would inform the jury of his prior conduct, if he persisted in suggesting that the legal processes and the court had treated him unfairly or denied him an opportunity to present his defense. Despite these warnings appellant persisted in making references in front of the jury about his lack of preparation, counsel and the unfairness of the procedures. The court did not volunteer this information or invite appellant to make these comments to the jury. The fact that appellant perceives the court's truthful statements as "damaging" to appellant's case does not prove a deprivation of appellant's constitutional rights to a fair trial.

Finally, while there were certainly things the court stated which were better left unsaid, none of the comments standing alone or when considered together, in my opinion based on the record as a whole, were so disparaging or inaccurate so as to deprive appellant of a fair trial. Moreover, any possible prejudice was ameliorated by the court's repeated instructions to the jury to disregard the exchanges between appellant and the court that concerned side issues or other proceedings unrelated to the issues of guilt. Our court routinely presumes that a jury admonished to disregard certain matters can follow such instructions and decide the case based on the evidence properly admitted relating to the charges. There is nothing in this record suggesting that this jury did not heed those instructions.

In view of all of the foregoing, I conclude the means used by the court to control the trial and the appellant who was bound and determined to derail the proceedings did not result in an unfair trial. As our Supreme Court has aptly observed, a defendant is entitled to a fair trial, not a perfect one. (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.) Appellant's trial was not perfect. But, it was fair. Accordingly, I would affirm the judgment.

WOODS, Acting P. J.